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SUPREME COURT OF THE UNITED STATES

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LOREN M. HEWIT
As Trustee in Bankruptcy of
CLARA E. KELLOGG,
Appellant,
against
THE BERLIN MACHINE WORKS.

FRANK H. ROBINSON,
Att'y for Appellant
Horpellsville, N. Y.

Certified by Mr. Justice Peckham 39

STATEMENT.

The Trustee in Bankruptcy and creditors complain of the decision of the District Court for Western New York and of the United States Court of Appeals 2nd cir affirming the same. The mill property of which certain machinery claimed by the Berlin Machine Works was a part came into possession of an officer of this Court March 1, 1901, (Receiver in Bankruptcy) and later a Trustee, and became part of the assets to be sold and proceeds to be distributed. Petition was made by the Trustee to sell, and the Berlin Machine Works came in and filed proof of claim and a petition asking for the machinery, claiming to be owners by reason of reservation of title. The Trustee claimed it was a part of the real estate which had been ordered sold, because the Berlin Machine Works had not complied with the conditional sale law of the State of New York and title was vested in him, the Trustee, by operation of law.

The issues were tried before the Referee in Bankruptcy and decided in favor of the Trustee and creditors. (See opinion and decision, Fols. 37 to 48.)

The decision was reviewed by the District Court and reversed on the sole ground that the bankruptcy act of 1898 was in effect the same as the previous acts conveying to the Trustee no better title than that possessed by the bankrupt. (See opinion, Fols. 80 to 101.) Which decision was affirmed by the Circuit Court of Appeals, and the Trustee appeals to this Court.

Both the Referee and the District Court held that by reason of the vendor having failed to comply with the conditional sale law of the State of New York, the reservation of title was void and the sale absolute, providing the Trustee acquired the same title as a subsequent purchaser in good faith.

I.

Section 70. a---Bankruptcy Law of 1898.

A careful reading satisfies me that there is no such provision as Sec. 70. a-5 of act 1898 in either the act of 1841 (see Sec. 3) or the act of 1867 (see Sec. 14), but that the same is entirely new and for a purpose. It is generally conceded by the District and Circuit Courts that the same is new.

Youkon Woolen Co., 2 A. B. R. 805, 96 Fed. 326.
In re Tatem, Mann & Co., 6 A. B. R. 426, 110 Fed. 519.
In re Booth, 3 A. B. R. 574, 98 Fed. 975.
In re Garcewich, 8 A. B. R. 149, 115 Fed. 87.
In re Frazier, 9 A. B. R. 21, 117 Fed. 746.

I am aware that my discussion may not be in accord with the views of the Judge writing the opinion in the New York Economical Printing Company, 110 Fed. 514, (which decision is inconsistent with Garcewich case decided by same Court), but I know my contention will be carefully considered and an opinion writ-

ten, having in mind that the Congress passing the act of 1898 was composed of men from all states, some of which states had local assignment laws which clothed an assignee with the same rights and title for which we are here contending.

It is respectfully submitted that the statute itself in terms defeats the claim of The Berlin Machine Works. In the first place, the Bankrupt Act gives Trustee all the title of the bankrupt in all his property except that which is exempt; *also* Sec. 70—(1) to the documents relating to the property; also (4) property transferred by him in fraud of creditors; also (5) property which he could *by any means* have transferred, or which might have been levied upon and sold under judicial process against him.

The Fourth Circuit Court of Appeals in Chesapeake Shoe Co. vs. Seldner, 10 A. B. R. at page 470 contrary to opinion in Economical Printing Company case above referred to, holds that the "filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction." At pages 472 and 473 it reads "In the case at bar, the shoes could have been transferred by the bankrupt." "If the 'title of the bankrupt' in Section 70 A means title as between him and a consignor or vendor, this section of the Act is not only utterly inconsistent with the entire spirit of the law, but the numerous decisions holding that the trustee in bankruptcy takes title to property sold to the bankrupt under unrecorded conditional contracts of sale must be held erroneous." I hope the Court will read the whole of this able opinion.

The statute regulating conditional sales in the State of New York expressly provides that the vendee may convey title to the property to purchasers or mortgagees

in good faith. It is a short way of saying it, but Congress has covered and intended to cover this condition of affairs in the statute in sub-division 5 of the section cited. It is very broad, any property which he could convey "*by any means.*" If it had been intended to limit the rights of the Trustee to only the right of the bankrupt, both sub-divisions 4 and 5 were unnecessary; it is covered by the preceding language in the section, and it is apparent that sub-division 5 was aimed at conditional sales and intended to cover them, *no matter what the form of the local statute might be.* The latter part of the sub-division was intended to cover the case of unfiled chattel mortgages and the first part of the sub-division was entirely unnecessary unless it was intended to reach cases where the title of the bankrupt might be defective as between himself and some other person. That if he had any power of sale "by any means," then that property should be taken by the Trustee in Bankruptcy. One of the principal purposes of the Bankrupt Act was to preserve equality among creditors and to prevent priority. When this purpose is borne in mind, the effect to be given to the words "by any means" is rendered the more apparent. In construing a statute, an effect should be given to every word in it if possible. It is quite apparent that each of the sub-divisions in Sec. 70 were intended to confer on the Trustee *additional rights beyond the mere title of the bankrupt to the property*, and, if that be so, what possible construction can be put upon the first part of sub-division 5 except that it was intended to confer upon the Trustee all of the rights which any person could acquire from the bankrupt. What else can the first part of sub. division 5 mean unless it should be construed to be a nullity; this construction should not be put upon any legislative act.

It will be readily seen that the bankrupt could have transferred this property to a subsequent purchaser, pledgee or mortgagee in good faith and have passed a good title as against the vendor (The Berlin Machine Works) and thus been within the express language of the section (70-a-5). It therefore follows that the Trustee by the terms of the Bankrupt Act occupies the relation of a purchaser in good faith.

Granting, for the sake of argument, that the Trustee in Bankruptcy is not a purchaser or pledgee in good faith as an actual fact, and granting that under the laws of the State of New York the conditional sale is not void as against execution creditors, still we take this position that it is void as against purchasers in good faith and that Miss Kellogg *could* have sold the property to a purchaser in good faith, and if she could have sold the property to a purchaser in good faith and as against him, under the conditional sales law of the State of New York, the reserved title would have been void and the sale absolute, Sec. 70-a, sub-division 5 of the Bankruptcy Act steps in and does the rest, to-wit: Transfers to the Trustee "the property which prior to the filing of the petition he (bankrupt) could by any means have transferred." In other words Clara E. Kellogg could have transferred this property to a purchaser in good faith, therefore, because of the phraseology of the new bankrupt act, the Trustee in Bankruptcy takes the title to such property, not because he is a purchaser in good faith, but because the statute says that he is vested "*by operation of law*" with the same title which a purchaser in good faith could have had, had the property been transferred by the bankrupt. We argue that the cases decided in states where the property could have been levied upon and sold under a judicial process are authorities for our contention herein, because those decisions give to the Trustee any title which the

bankrupt could have transferred under *those* statutes, or which could have been sold under *those* statutes. It is the same line of reasoning and depending upon two conditions—1st, the State Law; and, 2d, the Bankruptcy Law. If under the State Law the bankrupt could by any means have transferred the property, or if the property might have been levied upon and sold under judicial process against him, then in either case the Bankrupt Law says that the Trustee is vested "by operation of the law" with the title to that property.

The policy of the Bankrupt Act is to clothe the Trustee with title as against secret titles, liens and equities and compel everybody to comply with the state statutes or lose their title, lien or equity and to give the Trustee the protection which a purchaser in good faith or a creditor enjoys, and to prevent an action being brought against the Trustee for conversion years after he had sold the property and distributed the proceeds as an officer of this Court.

Clara E. Kellogg in fact conveyed the property in question to the C. E. Kellogg Co. for value and the Company conveyed it to the Trustree in Bankruptcy for the benefit of creditors, the reservation of title was void as against the C. E. Kellogg Co., void as against its grantee and void as against the Trustee in Bankruptcy.

II.

Actual Fraud.

The withholding from the files the conditional sale or failure to otherwise comply with the statute was an actual fraud upon creditors. The purpose of the

statute was to prevent conditional sales from remaining unpublished.

In re Garcewich. 8 A. B. R. 149-115 Fed. 87.
Frank v. Batten, 49 Hun. 91.
Moyer v. McIntyre, 43 Hun. 58.

If the vendee in any way pledges the property to an innocent party in good faith for however small an amount, the vendor is deprived of his title and lien. The property is pledged by the Trustee for borrowed money and expenses of administration.

Purchaser for Value Under the Lien Law.

The Receiver and Trustee is fairly within the definition of a purchaser for value under the Lien Law. He had no actual notice of the title notes until after he had accepted his trust, bound himself up to perform the duties of the Trustee, the compensation of which is based upon the amount of property coming into his hands. He had incurred liabilities either on his own account or on account of the general creditors to the amount of several thousands of dollars, which must be paid by some one, and the incurring of these liabilities on the faith of this property in possession of the bankrupt, without notice, made the Trustee either a lienor for value or a purchaser for value. The property covered by the title notes, as a matter of equitable practice, is chargeable with the lein of the expenses and obligations of the Receiver. The clear purpose of the act was to protect the money advances, at least, made on the faith of the property in the possession of the bankrupt. This point is an addition to the point urged above, that the Bankrupt Statute intended to protect the persons assuming the duties of the Trustee from the liabilities arising from secret liens and equities, and to give him all of the protection that existed in favor of a purchaser for

value as against such secret liens or secret equities. This construction of the statute is a fair construction and the reason for it might be illustrated by what might result in this case, namely, if the Trustee is liable for this reserve title, he would be liable for conversion for six years. He might sell the property in good faith and distribute the proceeds among the creditors and still, under the contention of the counsel for the vendors, he would be liable in an action of conversion for this property because, at the time he took it, he was not, as they claimed, within the protection of the lien law. *Congress had the right to give an officer of the United States Court this statutory protection, and it has done so by the statute cited.*

III.

The judgment of the United States Circuit Court of Appeals for the Second Circuit and of the District Court for the Western District of New York should be reversed and that of the Referee be affirmed.

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